

E-Filed 10/2/13

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

BRIAN DOUGLAS MARTIN,

No. C 12-6287 RS (PR)

Plaintiff,

ORDER OF SERVICE;

v.

**ORDER DIRECTING DEFENDANTS
TO FILE DISPOSITIVE MOTION OR
NOTICE REGARDING SUCH
MOTION;**

M. CATE, et al.,

Defendants.

INSTRUCTIONS TO CLERK

INTRODUCTION

This is a federal civil rights action filed pursuant to 42 U.S.C. § 1983 by a *pro se* state prisoner. The amended complaint (Docket No. 7) is before the Court for review. Having concluded that the amended complaint states cognizable claims, the Court directs defendants to file a dispositive motion, or notice regarding such motion, on or before January 25, 2014, unless an extension is granted. **The Court further directs that defendants are to adhere to the new notice provisions detailed in Sections 2.a and 10 of the conclusion of this order.**

DISCUSSION

A. Standard of Review

A federal court must conduct a preliminary screening in any case in which a prisoner

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1 seeks redress from a governmental entity or officer or employee of a governmental entity.
 2 *See* 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and
 3 dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may
 4 be granted or seek monetary relief from a defendant who is immune from such relief. *See id.*
 5 § 1915A(b)(1),(2). *Pro se* pleadings must be liberally construed. *See Balistreri v. Pacifica*
 6 *Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988).

7 A “complaint must contain sufficient factual matter, accepted as true, to ‘state a claim
 8 to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009)
 9 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “A claim has facial
 10 plausibility when the plaintiff pleads factual content that allows the court to draw the
 11 reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* (quoting
 12 *Twombly*, 550 U.S. at 556). Furthermore, a court “is not required to accept legal conclusions
 13 cast in the form of factual allegations if those conclusions cannot reasonably be drawn from
 14 the facts alleged.” *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754–55 (9th Cir. 1994).
 15 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements: (1)
 16 that a right secured by the Constitution or laws of the United States was violated, and (2)
 17 that the alleged violation was committed by a person acting under the color of state law. *See*
 18 *West v. Atkins*, 487 U.S. 42, 48 (1988).

19 **B. Legal Claims**

20 Plaintiff alleges that Matthew Cate, director of the CDCR, Anthony Hedgpeth, Greg
 21 Lewis, Michael Evans, and R. Grounds, wardens of Salinas Valley State Prison, and Salinas
 22 Valley Correctional Officers Glenn Ponder, Greg Biaggini, Alexandra Meza, R. Fritz, and
 23 N. Walker, violated his Eighth Amendment rights by denying him outdoor exercise time
 24 from September 3, 2005 to September 30, 2009. The claims against Cate, Hedgpeth, Lewis,
 25 Evans and Grounds are DISMISSED. Plaintiff’s allegations against these defendants are
 26 based on mere supervisory liability. This is not sufficient to state claims against them. There
 27 is no respondeat superior liability under § 1983. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir.
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1 1989). It is not enough that the supervisor merely has a supervisory relationship over the
 2 defendants; the plaintiff must show that the supervisor “participated in or directed the
 3 violations, or knew of the violations and failed to act to prevent them.” *Id.* Furthermore,
 4 supervisor defendants are entitled to qualified immunity where the allegations against them
 5 are simply “bald” or “conclusory” because such allegations do not “plausibly” establish the
 6 supervisors’ personal involvement in their subordinates’ constitutional wrong. *Ashcroft v.*
 7 *Iqbal*, 129 S. Ct. 1937, 1948–52 (2009).

8 The claims against the remaining defendants (Glenn Ponder, Greg Biaggini,
 9 Alexandra Meza, R. Fritz, and N. Walker), when liberally construed, are cognizable under
 10 § 1983. The events from September 3, 2005 to December 3, 2008 fall outside the limitations
 11 period, however, and plaintiff has failed to show cause (Docket No. 9) why the limitations
 12 period should be excused. In consequence, the period of the alleged violation for purposes of
 13 this action is from December 4, 2008 to September 30, 2009.

14 CONCLUSION

15 For the foregoing reasons, the Court orders as follows:

16 1. The Clerk of the Court shall issue summons and the United States
 17 Marshal shall serve, without prepayment of fees, a copy of the amended complaint in this
 18 matter, all attachments thereto, and a copy of this order upon Salinas Valley Correctional
 19 Officers Glenn Ponder, Greg Biaggini, Alexandra Meza, R. Fritz, and N. Walker. The Clerk
 20 shall also mail courtesy copies of the complaint and this order to the California Attorney
 21 General’s Office.

22 2. No later than ninety (90) days from the date of this order, defendants shall file a
 23 motion for summary judgment or other dispositive motion with respect to the claims in the
 24 complaint found to be cognizable above.

25 a. If defendants elect to file a motion to dismiss on the grounds plaintiff
 26 failed to exhaust his available administrative remedies as required by 42 U.S.C. § 1997e(a),
 27 defendants shall do so in an unenumerated Rule 12(b) motion pursuant to *Wyatt v. Terhune*,
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1 315 F.3d 1108, 1119–20 (9th Cir. 2003), cert. denied *Alameida v. Terhune*, 540 U.S. 810
2 (2003).

3 b. Any motion for summary judgment shall be supported by adequate
4 factual documentation and shall conform in all respects to Rule 56 of the Federal Rules of
5 Civil Procedure. Defendants are advised that summary judgment cannot be granted, nor
6 qualified immunity found, if material facts are in dispute. If any defendant is of the opinion
7 that this case cannot be resolved by summary judgment, he shall so inform the Court prior to
8 the date the summary judgment motion is due.

9 3. Plaintiff's opposition to the dispositive motion shall be filed with the Court and
10 served on defendants no later than forty-five (45) days from the date defendants' motion is
11 filed.

12 a. In the event the defendants file an unenumerated motion to dismiss
13 under Rule 12(b), plaintiff is hereby cautioned as follows:

14 The defendants have made a motion to dismiss pursuant to Rule 12(b) of the
15 Federal Rules of Civil Procedure, on the ground you have not exhausted your administrative
16 remedies. The motion will, if granted, result in the dismissal of your case. When a party you
17 are suing makes a motion to dismiss for failure to exhaust, and that motion is properly
18 supported by declarations (or other sworn testimony) and/or documents, you may not simply
19 rely on what your complaint says. Instead, you must set out specific facts in declarations,
20 depositions, answers to interrogatories, or documents, that contradict the facts shown in the
21 defendant's declarations and documents and show that you have in fact exhausted your
22 claims. If you do not submit your own evidence in opposition, the motion to dismiss, if
23 appropriate, may be granted and the case dismissed.

24 4. Defendants shall file a reply brief no later than fifteen (15) days after
25 plaintiff's opposition is filed.

26 5. The motion shall be deemed submitted as of the date the reply brief is due. No
27 hearing will be held on the motion unless the Court so orders at a later date.
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6. All communications by the plaintiff with the Court must be served on defendants, or defendants' counsel once counsel has been designated, by mailing a true copy of the document to defendants or defendants' counsel.

7. Discovery may be taken in accordance with the Federal Rules of Civil Procedure. No further court order under Federal Rule of Civil Procedure 30(a)(2) or Local Rule 16-1 is required before the parties may conduct discovery.

8. It is plaintiff's responsibility to prosecute this case. Plaintiff must keep the court informed of any change of address and must comply with the court's orders in a timely fashion. Failure to do so may result in the dismissal of this action for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b).

9. Extensions of time must be filed no later than the deadline sought to be extended and must be accompanied by a showing of good cause.

10. A recent decision from the Ninth Circuit requires that *pro se* prisoner-plaintiffs be given "notice of what is required of them in order to oppose" summary judgment motions at the time of filing of the motions, rather than when the court orders service of process or otherwise before the motions are filed. *Woods v. Carey*, No. 09-15548, slip op. 7871, 7874 (9th Cir. July 6, 2012). **Defendants shall provide the following notice to plaintiff when they file and serve any motion for summary judgment:**

The defendants have made a motion for summary judgment by which they seek to have your case dismissed. A motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure will, if granted, end your case.

Rule 56 tells you what you must do in order to oppose a motion for summary judgment. Generally, summary judgment must be granted when there is no genuine issue of material fact — that is, if there is no real dispute about any fact that would affect the result of your case, the party who asked for summary judgment is entitled to judgment as a matter of law, which will end your case. When a party you are suing makes a motion for summary judgment that is properly supported by declarations (or other sworn testimony), you cannot simply rely on what your complaint says. Instead, you must set out specific facts in declarations, depositions, answers to interrogatories, or authenticated documents, as provided in Rule 56(e), that contradict the facts shown in the defendants' declarations and documents and show that there is a genuine issue

1 of material fact for trial. If you do not submit your own evidence in opposition,
2 summary judgment, if appropriate, may be entered against you. If summary
judgment is granted, your case will be dismissed and there will be no trial.

3 *Rand v. Rowland*, 154 F.3d 952, 962–63 (9th Cir. 1998).

4 11. Plaintiff's motion to file an amended complaint (Docket No. 6) is GRANTED.
5 The amended complaint (Docket No. 7) is the operative complaint in this action. His motion
6 for an extension of time to file a response to the order to show cause (Docket No. 5) is
7 DENIED as moot, the response having been timely filed. His motion for a stay pending the
8 discharge of the order to show cause (Docket No. 8) is DENIED as moot. The Clerk shall
9 terminate Docket Nos. 5, 6, and 8.

10 **IT IS SO ORDERED.**

11 DATED: October 1, 2013


12 RICHARD SEEBORG
13 United States District Judge
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United States District Court
For the Northern District of California